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No. 88-1223.

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., PETITIONERS,

v.

UNITED STATES DEPARTMENT
OF DEFENSE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Reply Brief in Support of Certiorari.

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PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

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1. The respondents do not dispute that the issues raised here are of exceptional importance.

2. This case does not involve generalized "order[s] for active duty," as respondents' Question Presented would have it. If the orders had been for such active duty, without more, no case would ever have been brought.

Rather, the orders generating this case were for training, and the case arises under the Militia Training Clause of Art. I, § 8, cl. 16 of the Constitution.

The decision below is unprecedented in effectively nullifying the Militia Training Clause. There is no other case that construes the general language of the Armies Clause to override the clear terms of the Militia Training Clause, which expressly withholds the militia training power that the respondents assert.

Respondents' suggestion that the Selective Draft Law Cases, 245 U.S. 366 (1918) (validity of the draft for purposes of fighting World War I) and Cox v. Wood, 247 U.S. 3 (1918) (same) have already decided the question presented here in their favor is completely without merit. Neither case involved training. In fact, the only references to the Militia Training Clause in the Selective Draft Law Cases affirm the states' authority for "carrying out" the training of the militia. Id., 245 U.S. at 383, 387, quoted in Petition for Certiorari, p. 22.

Likewise, the lower court decisions cited by the respondents[1/] involved combat, not training. None construed the Militia Training Clause.

1/ Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969); Drifka v. Brainard, 294 F. Supp. 425 (W. D. Wash. 1968).

The respondents' contentions, if fairly stated, would be that the Court should extend -- but has not extended -- these cases to the training context and should allow Congress, rather than the States, to exercise "the Authority of training the Militia," thereby nullifying the Militia Training Clause. These are merely arguments on the merits.

3. Important constitutional issues of first impression will remain unresolved by this Court, unless certiorari is granted. No matter which way the Eighth Circuit en banc rules in Perpich v. United States Department of Defense, Eighth Circuit No. 87-5345, the Eighth Circuit panel's thorough majority opinion upholding the Commonwealth's position demonstrates that the power

asserted by the respondents here is highly controversial and doubtful.

The petitioners respectfully suggest that certiorari should be granted for the additional reasons stated in this reply brief.

Respectfully submitted,

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